BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

WILLIAM E. STUTESMAN, JR. Claimant	)	
VS.	)	Docket No. 1,049,360
U.S.D. 233 Self-Insured Respondent	)	

ORDER

STATEMENT OF THE CASE

Respondent requested review of the December 13, 2010, Award entered by Administrative Law Judge Kenneth J. Hursh. The Board heard oral argument on May 11, 2011. Michael W. Downing, of Kansas City, Missouri, appeared for claimant. Kip A. Kubin, of Kansas City, Missouri, appeared for the self-insured respondent.

The Administrative Law Judge (ALJ) found that claimant had a functional impairment of 10 percent to the body as a whole. The ALJ also found that claimant had a 2.5 percent preexisting functional impairment of the cervical spine. The ALJ further held that beginning March 1, 2010,[1] claimant was entitled to a 50 percent work disability based on a 0 percent task loss and a 100 percent wage loss. Subtracting claimant's 2.5 percent preexisting impairment, the ALJ found that claimant had a 47.5 percent work disability.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Respondent argues that the Board should reverse the ALJ's finding that claimant is entitled to a work disability. Respondent contends the law in Kansas is such that if an employee is solely responsible for losing his job by misconduct, he is not entitled to a work disability award.

[1] At oral argument, the parties agreed claimant was terminated on February 1, 2010, but fringe benefits continued until March 1, 2010.

Claimant asserts that the ALJ followed Kansas law, and the Award should be affirmed.

The issue for the Board's review is: Is claimant entitled to an award for work disability?

FINDINGS OF FACT

Claimant began working for respondent as a custodian in 2006. On August 1, 2008, while walking down a hall, he slipped on a tile floor covered with stripper and landed on his back. His head struck the floor. Claimant suffered neck and head injuries. He was treated that day at Olathe Occupational Medicine (OOM), where he was given medication. Claimant returned to OOM for follow-up a week later, still complaining of pain in his neck and headaches. At that time, he was referred to physical therapy. Because claimant's symptoms persisted, he was referred to Dr. Eden Wheeler, who also sent him to physical therapy and started him on other medications, including Elavil. Claimant continued treatment with Dr. Wheeler until released on July 1, 2009. Dr. Wheeler gave claimant a six-month supply of Elavil when he was released from treatment. Claimant was unable to obtain any more Elavil after that supply ran out in December 2009, although Dr. Wheeler told him he should remain on Elavil for two or three years.

Claimant did not miss any work after his injury and continued to perform his full, regular duties through January 25, 2010. He was terminated by respondent on February 1, 2010, after he and his supervisor had a "spirited disagreement."[2] Harry Rodriquez, claimant's supervisor, said that claimant had been given a verbal warning and a written warning and had been placed on probation, all before the August 1, 2008, injury. Mr. Rodriquez testified that claimant was terminated on February 1, 2010, because of his deficient job performance.[3] Claimant has looked for work since his termination but has been unable to find a job.

Dr. Michael Poppa is a full-time physician practicing occupational medicine. He is board certified in preventative medicine and is a certified independent medical examiner. He evaluated claimant on March 25, 2010, at the request of claimant's attorney. Claimant gave Dr. Poppa a history of his job duties, the work-related accident, and his medical treatment. Claimant told Dr. Poppa he continued to experience constant pain and problems in his head and neck. Claimant told him his pain and problems interfered with his activities of daily living. He said he could not turn his head from side to side without pain, which interfered with his ability to drive. Claimant indicated that movement of his

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[2] R.H. Trans. at 12.

[3] The parties stipulated that claimant's pre-injury average weekly wage was $496.53. After March 1, 2010, when claimant's fringe benefits were terminated, his average weekly wage was $611.45.

head with normal activity creates and aggravates headaches, causing him to take more time to complete a task or activity. Claimant also said he had trouble sleeping and performing his job duties. In Dr. Poppa's examination of claimant's cervical and thoracic spine, he found that claimant had functional range of motion, which he described as less than normal, with pain at the end range of all motion.

Claimant gave Dr. Poppa a history of neck involvement and upper back problems secondary to a motor vehicle accident in 2005 but said those problems resolved before the work-related accident in August 2008. Dr. Poppa opined that claimant had no residual impairment from his 2005 injury based on claimant's statements that his symptoms resolved satisfactorily and that he was doing fine before his work injury. Dr. Poppa admitted he did not review any medical records involving claimant's 2005 injury.

Dr. Poppa believed that claimant had reached maximum medical improvement regarding his work-related accident of August 1, 2008. He diagnosed claimant with a contusion with headaches, a cervical spine contusion with chronic musculoligamentous sprain and strain, aggravation of his preexisting degenerative condition, and chronic myofascitis with pain. He opined that claimant's thoracic spine manifested as a contusion, chronic musculoligamentous sprain/strain and chronic myofascitis with pain. He believed all these conditions were the direct result of claimant's accident of August 1, 2008.

Dr. Poppa said claimant would need to continue his home exercise program and include myofascial release techniques involving his neck and upper back. At the time Dr. Poppa saw claimant, claimant was taking over-the-counter Ibuprofen but was not taking any prescription medication. Dr. Poppa said it would benefit claimant to continue with his Elavil for treatment of his chronic myofascitis.

Based on the AMA *Guides*,[4] Dr. Poppa rated claimant having a 5 percent whole person impairment for chronic pain and headaches. He also found claimant was in DRE Category II with a 5 percent impairment to the whole body for the work-related injury to his cervical spine. As a result of claimant's injury involving his thoracic spine, Dr. Poppa rated him as having a 5 percent whole person impairment. Using the Combined Values Chart, Dr. Poppa's ratings combined for a 15 percent impairment of the whole person secondary to his work-related injury involving his head, neck and upper back. He did not recommend any particular restrictions and said claimant could perform the duties of his job with respondent.

Dr. Chris Fevurly, who is board certified in preventative medicine and is a certified independent medical examiner, evaluated claimant on August 27, 2010, at the request of respondent. He took a history from claimant of the work-related injury and reviewed

[4] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

claimant's medical records since the date of accident. Claimant also told him about his prior motor vehicle accidents, specifically his accidents in 2005, after which claimant said he was given a 1 percent permanent partial impairment rating by Dr. James Zarr. Claimant also said he had been involved in motor vehicle accidents in the 1990s and 2000s. Claimant told him he did not have any problems with his back, neck or head when he started working for respondent in 2006, as his previous injuries had resolved before then.

Dr. Fevurly did not have Dr. Zarr's actual report giving claimant a 1 percent permanent partial impairment as a result of one of his 2005 motor vehicle accidents, so he did not know if the rating was isolated to just low back pain. Nevertheless, he stated: "I've been doing impairment ratings now for about 20 years and I can pretty much tell what he [Dr. Zarr] was doing there."[5]

At the time of the examination, claimant was still complaining of headaches with pain radiating into his neck and upper back that was aggravated by turning his head. During the physical examination, claimant reported pain at the extreme ranges of all cervical range of motion testing. He also had pain with palpation of the cervical and thoracic spine.

Based on the AMA *Guides*, Dr. Fevurly found that claimant was in DRE cervicothoracic Category II for a 5 percent whole person impairment. He opined that half of claimant's impairment, 2.5 percent, was preexisting based on claimant's medical history as reported to him. Dr. Fevurly based his opinion that claimant had preexisting impairment on claimant's statements that he had chronic pain for at least a year and a half and received a permanent impairment rating from Dr. Zarr for neck, mid back and low back pain.[6]

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

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[5] Fevurly Depo. at 18.

[6] As noted earlier, Dr. Fevurly admitted he had not seen Dr. Zarr's report and did not know what parts of claimant's body were included in Dr. Zarr's 1 percent rating.

K.S.A. 44-501(c) states:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

K.S.A. 44-510e(a) states in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

In *Bergstrom*,[7] the Kansas Supreme Court stated:

> When a workers compensation statute is plain and unambiguous, the courts must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, there is no need to resort to statutory construction.
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> A history of incorrectly decided cases does not compel the Supreme Court to disregard plain statutory language and to perpetuate incorrect analysis of workers compensation statutes. The court is not inexorably bound by precedent, and it will reject rules that were originally erroneous or are no longer sound.

[7] *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, Syl. ¶ 1, 2, 214 P.3d 676 (2009).

In *Tyler*,[8] the Kansas Court of Appeals stated: "Absent a specific statutory provision requiring a nexus between the wage loss and the injury, this court is not to read into the statute such a requirement."

In *Osborn*,[9] the Court of Appeals reversed the Board's imputing of a post-injury wage where it was determined the claimant failed to make a good-faith job search. Respondent argued the case was factually distinguishable from *Bergstrom*[10] because the claimant in *Bergstrom* was directed to stop working by a physician whereas the claimant in *Osborn* voluntarily quit an accommodated job. Further, the respondent argued there must be a causal connection between the wage loss and the injury. The Court of Appeals rejected both arguments, noting there is nothing in K.S.A. 44-510e that permits the factfinder to impute a wage. Citing *Bergstrom* and *Tyler*, the Court of Appeals reiterated that there is no requirement for a claimant to prove a causal connection between the injury and the job loss.[11]

ANALYSIS

Respondent contends that the *Bergstrom* and *Tyler* decisions are contrary to public policy and to the legislative intent of the Workers Compensation Act. Respondent further argues that those decisions should be distinguished from this case because the claimant herein was terminated for cause and, in essence, voluntarily quit his employment with respondent. The Board believes that the Kansas appellate courts have spoken on this good faith issue and, as such, the reasons for claimant's wage loss are not relevant to the determination of work disability under K.S.A. 44-510e. A wage will not be imputed to claimant. Likewise, claimant will not be limited to his percentage of functional impairment after he stopped working for respondent. The ALJ's finding that claimant thereafter had a 100 percent wage loss and is entitled to an award of permanent partial disability compensation based on work disability is affirmed.

The ALJ reduced claimant's permanent partial disability award by 2.5 percent, stating: "The fact that the claimant was given a permanent disability rating from the prior injury supports Dr. Fevurly's conclusion that there was pre-existing permanent

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[8] *Tyler v. Goodyear Tire & Rubber Co.*, 43 Kan. App. 2d 386, 391, 224 P.3d 1197 (2010). See also *Lewis v. Sun Graphics, Inc.*, 2010 WL 3564802, Kansas Court of Appeals unpublished opinion filed September 3, 2010 (No. 103,277).

[9] *Osborn v. U.S.D. 450*, 2010 WL 4977119, Kansas Court of Appeals unpublished opinion filed November 12, 2010 (No. 102,674).

[10] *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

[11] See also *Guzman v. Dold Foods, LLC.*, 2010 WL 1253714, Kansas Court of Appeals unpublished opinion filed March 26, 2010 (No. 102,139).

impairment."[12] The prior disability rating to which the ALJ and Dr. Fevurly refer was the 1 percent impairment rating claimant said he had been given by Dr. James Zarr. However, Dr. Zarr did not testify in this case. His records are not in evidence. Dr. Fevurly acknowledged that he did not review Dr. Zarr's records and never saw any rating report concerning claimant's preexisting condition. It is unknown what Dr. Zarr actually rated. Before this work accident, claimant had injuries and conditions to parts of his body that are not a part of this workers compensation claim. Dr. Fevurly's 2.5 percent rating of claimant's preexisting cervicothoracic condition is based on speculation and conjecture. After claimant has established a percentage of permanent impairment under the 4th edition of the AMA *Guides* has resulted from the work-related injury, respondent bears the burden to prove the percentage of permanent impairment that preexisted the accident.[13] Respondent has failed in that burden. Except as to respondent's entitlement to a K.S.A. 44-501(c) credit for preexisting impairment, the Board agrees with and affirms the findings and conclusions of the ALJ.

CONCLUSION

The Board concludes that the Award should be modified to delete the credit for preexisting impairment but is otherwise affirmed. Claimant is entitled to a work disability of 50 percent.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated December 13, 2010, is modified to find that claimant has a work disability of 50 percent.

Claimant is entitled to 41.5 weeks of permanent partial disability compensation at the rate of $331.04 per week or $13,738.16 for a 10 percent functional disability followed by 4 weeks of permanent partial disability compensation at the rate of $331.04 per week or $1,324.16 followed by 162 weeks of permanent partial disability compensation at the rate of $407.65 per week or $66,039.30 for a 50 percent work disability, making a total award of $81,101.62.

As of May 16, 2011, there would be due and owing to the claimant 45.5 weeks of permanent partial disability compensation at the rate of $331.04 per week in the sum of $15,062.32 plus 63.14 weeks of permanent partial disability compensation at the rate of

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[12] ALJ Award (filed Dec. 13, 2010) at 3.

[13] *Payne v. Boeing Co.*, 39 Kan. App. 2d 353, 180 P.3d 590 (2008); *Hanson v. Logan U.S.D.*, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001); *Watson v. Spiegel*, No. 85,108, unpublished Court of Appeals opinion filed June 1, 2001; *Mattucci v. Western Staff Service*, No. 83,268, unpublished Court of Appeals opinion filed June 9, 2000.

$407.65 per week in the sum of $25,739.02 for a total due and owing of $40,801.34, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $40,300.28 shall be paid at the rate of $407.65 per week for 98.86 weeks or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of May, 2011.

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BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: Michael W. Downing, Attorney for Claimant
Kip A. Kubin, Attorney for Self-Insured Respondent
Kenneth J. Hursh, Administrative Law Judge